United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
Sol Bogen

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75C 6079

Docket No. 75-6079

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

- -

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

- -

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

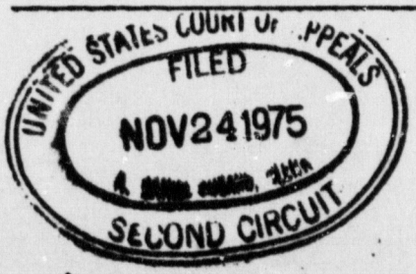
NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

- -

On Appeal From The United States District Court
For The Southern District of New York

REPLY BRIEF FOR DEFENDANTS-APPELLANTS



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November 24, 1975

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I. PRELIMINARY STATEMENT

Pursuant to agreement of the parties hereto and in order to expedite the hearing and determination of this appeal, this Court issued a Scheduling Order on September 9, 1975 under which Appellants filed their opening brief on October 10, 1975. Thereafter, although Appellees filed cross-notices of appeal, the parties agreed, pursuant to paragraph (h) of Rule 28 of the Federal Rules of Appellate Procedure, that they would retain their designations contained in the Scheduling Order and that the schedule for the submission of briefs contained therein would be adhered to. The parties further agreed that arguments relating to the issues raised by the cross-appeals would be initially presented in Appellees' answering briefs and initially responded to by Appellants in their reply brief.

Accordingly, Appellants now file this brief in reply to Appellees' answering brief on the issues raised in the notice of appeal and, further, in answer to Appellees' briefs on the issues raised by the cross-appeals.

II. APPELLANTS' REPLY TO ISSUES RAISED IN THEIR NOTICE OF APPEAL

A. The District Court's Imposition of A Quota System Is Improper

In light of the overriding public policy against the imposition of racial quotas, it is respectfully submitted that the District Court's imposition of a racial quota to be implemented by granting a preference to non-whites in admission to Local 28, is an abuse of discretion.

With respect to the JAC apprenticeship program, the predominant avenue to union membership,[1] it cannot be too oft repeated that since 1964, the entire program has been administered in strict compliance with the order and opinion of Judge Markowitz in State Commission on Human Rights v. Farrell, 43 Misc.2d 958, 252 N.Y.S.2d 649 (Sup. Ct., N.Y.Co. 1964), which includes the "Corrected Fifth Draft" (1067a; 1071a; 1082a). It was under this court order that the JAC battery of tests found by the District Court to have a non-intentional, discriminatory impact on minorities, were administered. These tests were professionally selected and validated by Stevens Institute of Technology (1072a) whose impartiality and

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1. As noted in the Equal Employment Opportunity Commission's ("EEOC") brief (p. 9), approximately 90% of Local 28's present journeymen members are graduates of the apprentice program, (1235a; see also Stipulation of Facts ¶15, 1066a).

integrity has remained unquestioned throughout.[2]

In its brief, EEOC suggests that the apprentice selection procedure mandated by Judge Markowitz was instituted by Local 28 and JAC with the intention of excluding non-whites (EEOC brief, p. 25). Appellants submit that such a contention is wholly unsupported by the record or the findings and conclusions of the District Court.[3] The fact of the matter is, as found by the District Court, that Local 28 and JAC were compelled by Judge Markowitz to utilize these very selection procedures, including the subject tests.

EEOC further improperly suggests that Local 28 and the JAC imposed a requirement of a high school diploma as an impediment to admission of non-whites into the apprentice program (EEOC brief, p. 26, 27). Once again, EEOC has chosen to ignore the fact that the requirement of a high school diploma was imposed by Judge Markowitz and that the District Court expressly so found; Finding of Fact 21 (77a).[4]

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2. Although the District Court opted for the opinion of appellees' expert witness rather than that presented by appellants in deciding the validity of the tests, no shadow of indiscretion was cast on the latter.

3. Indeed, the very citation in EEOC's brief (Opinion, p. 80a) is to a portion of the District Court's opinion which expressly recognized that the selection procedure was provided for in the Corrected Fifth Draft.

4. Another example of the liberties taken by Appellees is the attempt to present new evidence to this Court. The City's citation of Zuckerman, "The Sheet Metal Workers' Case: A Case History Of Discrimination in the Building Trades," Labor Law Journal 416 (1969) (Brief, p. 18n) is blatantly prejudicial and improper. The article is not part of the record below, was never referred to or introduced in evidence, and is clearly hearsay. Nor is it cited in support of a legal argument, or for its independent legal significance.

Both EEOC and the City claim that Local 28 sought to bar non-whites from the apprenticeship program by providing special tutoring to whites in advance of the testing (EEOC brief, p. 26). In support thereof, they cite the testimony of Robert Schluter to the effect that training sessions intended to aid union members' friends and relatives in taking the JAC battery were given by Local 28. However, Schluter testified on cross-examination that the program was similar to a tutoring program which had been initiated by the Workers Defense League in order to prepare non-whites for the tests (Trial Transcript 161-62; See Addendum to Brief). Continuing, Schulter testified that the two programs exchanged teaching materials as well as students and that the exchange program developed in 1966 had continued till the date of trial (Trial Tr. p. 164).[5]

From the foregoing, it is abundantly clear that the unintentional nature of the discrimination in admission to the apprenticeship program neither requires nor justifies the District Court's imposition of racial quotas, particularly in view of the other extensive affirmative relief ordered.

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5. Indeed, it appears that the preparation given by the Workers Defense League which included the actual math test given, improperly aided non-whites to achieve scores (e.g. 99%) on an exam in which they had previously achieved scores of only 10% or 12%.

In fact, adherence to accepted equitable doctrines mandates the conclusion that the imposition of a racial quota where adequate alternative remedies have been provided is an abuse of discretion. Milliken v. Bradley, 418 U.S. 717 (1974).

The direction of a general racial quota far exceeds the prospective relief necessary to remedy any discriminatory impact occasioned by the selection procedures, including examinations, ordered by Judge Markowitz. The general quota system imposed would constitute a windfall preference to non-whites who were never involved with the selection procedures challenged by Appellees. Further, a quota system would result in a preference in union admission for all non-whites solely because of their race, a result itself proscribed by Title VII.

The purposes of Title VII are fully satisfied by the other aspects of the relief ordered which will assure non-white applicants an equal opportunity to compete for admission on the same terms as whites through the administration of racially neutral apprenticeship tests without undermining the rights of future white applicants. To grant a preference to non-whites who were never the subject of discriminatory exclusion is a perversion of the original and continuing intent of Title VII: assurance of equal opportunity to all, without preference based solely on race.

In sum, this alternative approach presents a proper balance between competing principles and interests. Indeed, this moderate approach of "rightful place" has been followed by this Court in lieu of more drastic remedies in similar circumstances. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971).

In conclusion, the imposition of a racial quota is contrary to clearly recognized public policy and equitable principles. In light of the broad relief granted by other provisions of the District Court's Order, the direction of a preference in admission to unknown persons solely on the basis of race is an abuse of discretion in the circumstances obtaining herein.

B. The District Court's Order directing that Local 28 replace one of its white trustees to the JAC with a non-white is unconscionable.

The absence of any judicial authority for the replacement of one of the white JAC trustees with a non-white is acknowledged by the briefs of both EEOC and the City. That this aspect of the relief constitutes impermissible reverse discrimination and a deprivation of rights of individuals who have not been charged or found to have engaged in any impropriety is fully discussed in Appellants' opening brief. However, EEOC

contends that the establishment of an examining board in Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2nd Cir. 1974), is authority for the substitution of a present union trustee with a non-white. In Rios, the examining board was appointed to replace the union officers who were found to have engaged in discriminatory conduct by excluding black applicants because of their race. It is, therefore, clear that the examining board was necessary in order to remove a power which had been abused by union officers. In the instant case, the JAC was never alleged to have discriminated, nor did the court find that any JAC trustee, union or employer, had engaged in any discriminatory acts. Rather, all that the JAC trustees did was perform the ministerial functions attendant to the apprenticeship program. In fact, the trustees did nothing more than comply with the selection procedures, including the tests, directed by Judge Markowitz's Order. Thus, the only legal precedent cited by Appellees in support of this unheard of remedy of the District Court is entirely inapposite.

As there is neither legal authority nor practical justification for the District Court's directive for the substitution of one of the union's white JAC trustees with a non-white, solely on the basis of race, this aspect of the Order should be vacated.

III. APPELLANTS' ANSWER TO ISSUES RAISED BY APPELLEES' CROSS-APPEAL

The notices of cross-appeal filed by the EEOC and the City raise two issues:

(1) the propriety of the District Court's conclusion that the inquiry as to arrest records on the apprenticeship program application form did not discriminate against non-whites (Opinion, 92a); and

(2) the granting of backpay only to those non-whites for whom there exist records of application for direct entry into the union, and who demonstrate discriminatory exclusion from membership and monetary damages as a result thereof (Opinion, 110a).

A. The District Court's Determination of the Legality of the Arrest Record Inquiry Is Moot and should not be Considered by this Court.

In its brief, EEOC notes that JAC has agreed, voluntarily, to revise its practice of arrest record inquiry, and thus views the issue as moot (EEOC Brief, p. 3). Appellants concur. For reasons not readily apparent, the City continues to press this issue even though it, too, seems to recognize its mootness.[6] Notwithstanding any contentions made by the City

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6. See City Brief, p. 48.

herein, it is apparent that as there is no longer any justiciable controversy, the issue is moot and is not properly before this Court for determination. SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

B. The District Court did not Abuse its Discretion in Awarding Backpay to Certain Classes of Discriminatees and not to others.

The court below (Opinion, 108a) fashioned its backpay award with express reference and strict adherence to the principles enunciated by the United States Supreme Court in Albemarle Paper Co. v. Moody, 95 S.Ct. 2362 (1975). In delineating the broad standards by which the courts should award backpay in Title VII cases, the Court in Albemarle reversed a determination that the absence of bad faith or intentional discrimination was, per se, sufficient reason to deny backpay. In so doing, the Court held that the unintentional character of the misconduct was one of several relevant factors to be considered by the district court in formulating an award consistent with the purposes of Title VII. Id. at 2373-74. Albemarle sets out the broad parameters within which the district courts shall exercise discretion. Albemarle does not change the standard of review by which the discretion is to be judged (p. 2375):

"But the standard of review will be the familiar one of whether the District Court was' clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case, Langres v. Green, 282 U.S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520."

A comparison of the facts of Albemarle with those of the case at bar clearly shows that the District Court did not abuse its discretion but, rather, exercised it within the letter and intent expressed by the Supreme Court.

First, in Albemarle, the District Court denied backpay to everyone in the plaintiff's class on the ground that the employer acted in good faith. Here, the lower court established criteria by which certain non-whites who had been damaged could recover backpay by presenting their claims to the Administrator. Thus, backpay is available for those who come within the terms of the Order.

Second, Albemarle was primarily concerned with an employer's liability for backpay, even though the local union had been joined as a defendant. And, as more fully discussed infra, since any liability for backpay would be satisfied from general union funds contributed by all union members, the court below expressed an even handed concern for the "inequitabl[e] drain [of] the financial resources of the non-profit defendant association" (Opinion, p. 110a). Certainly consideration of

such a factor is relevant and within the scope of the court's discretion in reaching a "just result." Albemarle, supra, at 2375.

Third, the speculative nature of the identification of individuals who may have possibly suffered monetary damages,[7] the time and expense necessary for their ascertainment, and the speculation as to the amount of damages are clearly relevant factors. The District Court's consideration of these matters is a proper discharge of its responsibilities under Albemarle.

Of course, whatever the result, the District Court was obliged to state its rationale in support of its conclusion. This was stressed by the court in Albemarle (p. 2373, n. 14):

> "It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons."

The District Court expressly did so in its opinion (Opinion, 108-111a). After discussing the relevant standards enunciated in Albemarle, the court noted that plaintiff's late request for backpay did "not preclude the court from awarding it where entitled." (Opinion. 109a).

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7. Appellees stress the lack of record-keeping by the Union and JAC was a violation of EEOC regulations. (EEOC Brief, p. 45; City Brief, p. 29). Those regulations do not have the force and effect of law, and neither the Union nor JAC were subjected to legal sanctions for their failure to comply with these regulations. Furthermore, the City's suggestion that the voluntary destruction of record which occurred in Bowe v. Colgate Palmolive, 416 F.2d 711 (7th Cir. 1969), is somehow analogous to the situation here (Brief, p. 50-51) is misguided but sadly consistent with the City's other improprieties, supra, n. 4.

On a motion for backpay for members of the plaintiff classes in Rios v. Enterprise Association Steamfitters, Local 638, _____ F. Supp. _____, 10 EPD ¶10, 273 (S.D.N.Y. 1975) (Bonsal, D.J.), the District Court established standards for the award of backpay strikingly similar to those enunciated by Judge Werker. The court awarded backpay for any claimant who files a claim proving the following:

> "(1) He applied in writing for membership in Local 638's A Branch.
>
> "(2) He was discriminatorily denied admission to the A Branch after October 15, 1968. Discrimination as to a claimant for purposes of back pay will commence on the date on which the next applicant for membership in the A Branch who does not qualify as a member of the plaintiff class was admitted to the A Branch. This discrimination for purposes of back pay awards will be deemed to continue until the date claimant was admitted to the A Branch or until June 21, 1973, whichever is earlier.
>
> "(3) At the time of his application, the claimant resided in a county within the jurisdiction of Local 638, and was qualified for admission under the standards used in the implementation of this Court's Order of June 21, 1973.
>
> "(4) The claimant proves monetary damages resulting from his denial of admission to the A Branch, less any other employment income or public assistance. Monetary damages will be computed on the basis of the average monthly wage paid to members who were admitted to the A Branch on or after October 15, 1968." 10 EPD at 5148.

The award by Judge Werker is almost identical to the Rios determination. Yet Appellees would suggest to this Court that two different District Courts, with full knowledge of and reference to the Supreme Court's mandate in Albemarle, abused their discretion by limiting backpay to exactly the same classes of individuals. Appellants suggest that this Court may not find that the scope of the backpay award ordered by Judge Werker (and for that matter, the same award by Judge Bonsal) is "clearly erroneous." Albemarle, supra, at 2375.

Further, an analysis of each component of the class of persons alleged to be entitled to backpay will demonstrate the propriety of the District Court's determination.

With respect to entrance into the apprenticeship program, an award of backpay is conjectural as there is no assurance that the program would have been successfully completed by the apprentice over the four-year period, culminating in admission to the union as a journeyman. Similarly, it is impossible to determine which, if any, individuals would have been sufficiently successful on a validated JAC battery of tests to be selected for the program.

Nor is the denial of backpay to Local 400 blowpipe workers an abuse of discretion. Local 28 would hardly have been able to organize all Local 400 shops. Organization

depends on the exigencies of an NLRB election and the outcome of collective bargaining. Thus, the District Court would have no way of determining which people would actually have become Local 28 members among all existing Local 400 members. Further, there is no way of determining which of the Local 400 members would have earned more as a member of Local 28.

Most speculative of all would be the award of damages to that class of non-whites who would have applied for direct admission but for Local 28's "reputation" for discrimination. So vague and uncertain is this class of persons that an award to them would be tantamount to an assessment of punitive damages against the Union distributed randomly to non-whites in the community.

Appellees' reliance on Hairston v. McLean Trucking Co., 520 F.2d 226, 232-233 (4th Cir. 1975) is misconceived. (EEOC Brief, p. 48; City Brief, p. 52). First, the District Court in Hairston, prior to Albemarle, denied relief on the mistaken assumption that lack of bad faith was a defense to an award of backpay. See Albemarle, supra. Second, the speculative nature of damages in Hairston related not to the identity, but to the amount due actually identified employees. The Court of Appeals, subsequent to Albemarle, held that in spite of uncertainty in the amount due a particular employee, a sum could be computed,

since such variables as length of service, job availability and desire for advancement could be fairly estimated. In the instant case, however, the court must speculate, initially as to whom damages are due, and then as to the amount. Thus, the court would be forced to compound the speculation inherent in any determination. Accordingly, it certainly cannot be said that the refusal to undertake this exercise in hypothecation was an abuse of discretion.

United States v. U. S. Steel, _____ F.2d _____, 10 EPD ¶10, 436 (5th Cir. 1975), similarly does not support the Appellees. There too, the lower court had passed on the issue of damages without benefit of Albemarle or more recent controlling precedent in the Fifth Circuit. On this basis alone, reversal was required. Moreover, as in Hairston, the issue was uncertainty as to the amount, rather than the identity of the recipients of backpay. In both Hairston and U. S. Steel, the class of affected persons were identified employees at one of defendant's work facilities. In the instant case, no such identification of aggrieved individuals is reasonably possible given the circumstances which obtain. Accordingly, it cannot be said that the District Court's exercise of its discretion to limit the award of backpay was "clearly erroneous."

The City urges the Court to look to the backpay provisions of the National Labor Relations Act, 29 U.S.C. §160(c), in support of the proposition that an award of backpay is required herein. The City attempts to further buttress the analogy of the NLRA to Title VII by citation to Albemarle, supra, in which the Supreme Court cites to the legislative history of Title VII and concludes that the applicable standards of both statutes are similar. 95 S.Ct. at 2372-73. The last link in the analogy, according to the City, is that since awards of backpay under the NLRA presumptively follow in instances in which unfair labor practices have been committed, a priori, it should presumptively follow here.

Appellants concede the philosophical similarity of the NLRA and Title VII, Albemarle, supra, and further concede that the analogy would seem to lend credibility to the City's constructed chain of reasoning. However, the pyramid reasoning has at its base a fatal building block. All the cases cited by the City involve employer liability for unfair labor practices. The consistent practice of the NLRB has been to refuse to impose backpay liability upon unions, especially where to do so would imperil the union's ability to exercise its Section 7 rights or subject it to inordinate monetary liability. This long-standing policy was recently reaffirmed by the First Circuit in NLRB v. Oil, Chemical and Atomic Workers International Union, 476 F.2d

1031 (1st Cir. 1973), where the Board, consistent with prior decisions, denied the award of backpay against a union, and the court concurred (p. 1037):

> "Lastly, the Company seeks the unusual remedy of back-payments by the Union to the employees prevented from working because of the Union's conduct. Again, the appropriate remedy is a matter for administrative judgment. Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). The Board has a long-standing policy against such awards in this type of case, Colonial Hardwood Flooring Co. Inc., 84 N.L.R.B. 563 (1949), grounded in sound policy, Long Construction Co., 145 N.L.R.B. 554 (1963), which it has recently reaffirmed, over dissent, in the face of contrary recommendations by the General Counsel and the Administrative Law Judge. Union de Tronquista de Puerto Rico, Local 901 (Lock Joint Pipe & Co. of Puerto Rico, 24-CB-774, 775 (N.L.R.B. Mar. 15, 1973). We can see no error in enforcing what was then and still is existing Board policy. Nor can we say that that policy, or its application in this case, is 'unwarranted in law' or 'without justification in fact' Glover Livestock, supra, 411 U.S. 186, 93 S.Ct. 1455.

The NLRB's refusal to award backpay against a union is predicated, inter alia, on the ground of financial inability of unions to satisfy such an award and the devastation of the collective bargaining process which is a natural consequence of employee representation by bankrupt bargaining agents:

> "In exercising its broad discretionary powers under Section 10(c) of the Act the Board has always been careful to balance the effectiveness of a particular remedy against its consequences. Thus, the Board has refrained from directing an otherwise appropriate remedy where practical and economic considerations dictated a lesser deterrent. (citations omitted)
>
> * * *

> [a]dequate remedies under the Act other than backpay exist to prevent the occurrence of violence without interfering with the right to strike.
>
> * * *
>
> "To do more, in our opinion, runs the risk of inhibiting the right of employees to strike to such an extent as to substantially diminish that right. For the misconduct of a few pickets may be sufficient to find the union in violation of Section 8(b)(1)(A) and enough to intimidate many employees. The Board would then be required, under the logic of our dissenting colleagues, to seek backpay for all intimidated employees. Faced with this financial responsibility, few unions would be in a position to establish a picket line. In our opinion, union misconduct of this nature, while serious, does not warrant the adoption of a remedy so severe as to risk the diminution of the right to strike, a fundamental right guaranteed by Sections 7 and 13 of the Act." Teamsters, Local 901 (Lock Joint Pipe & Co. of Puerto Rico), 202 NLRB 397, 82 LRRM at 1582 (1973).

If the philosophy and intent of the NLRA and Title VII are analogous with respect to backpay, a fortiori, the balance struck by the NLRB between devastating a union financially and the federal labor policy of maintaining industrial peace through the existence of viable collective bargaining agents is clearly applicable to Title VII.

Lastly, the City contends that welfare and unemployment benefits should not be deducted from the backpay award. Most courts which have confronted the issue have held that it is proper to reduce the backpay award by any unemployment benefits received. Bowe v. Colgate-Palmolive Co., supra.

("The deduction of unemployment compensation was proper, being a valid exercise of the trial judge's discretion pursuant to 42 U.S.C. §2000e-5(g)."); Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974), aff'd, ____ F.2d ____, 11 FEP Cases 1, 10 EPD ¶10, 359 (6th Cir. 1975); Hodgson v. Ideal Corrugated Box Co., 10 FEP Cases 745 (N.D. W.Va. 1974) (backpay reduced by unemployment compensation in age discrimination suit). Public assistance benefits were also excluded from backpay awards by the District Court in Rios, supra, 10 EPD at 5148.

Further, denial of the deduction for public assistance would constitute a windfall to the individuals awarded backpay. In this connection, Appellants respectfully submit that the City's contention that it would seek to recover these payments is nothing more than a self-serving declaration of intent totally unsupported by the record or common experience.

In sum, the District Court meticulously adhered to the principles of Albemarle in evaluating all relevant factors in its precise determination of the scope of the backpay award. The record amply demonstrates that the District Court did not abuse its discretion in this regard and that its ultimate determination as to backpay was not "clearly erroneous."

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court:

(a) vacate so much of the Order and Judgment of the District Court which

(i) directs the imposition of a quota system supported by a preference for non-whites and implemented by an Administrator; and

(ii) directs that a white union trustee of the JAC be replaced by a non-white; and

(b) affirm that part of the Order and Judgment of the District Court which

(i) relates to arrest record inquiries on the ground that the issue is moot, and

(ii) establishes standards and procedures for the award of backpay claims.

Respectfully submitted,

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November 24, 1975

ADDENDUM

required or taught the sketching and drawing of plans?

A Yes, at that time they are drawing them.

Q What term is the testing and balancing subject given?

A Again, generally in the last year. It is fit in somehow in the last year. We have a video tape machine in the school and we have various video tapes on testing and balancing procedures. We have ports cut into the system, that is in the school, so we can teach them how to take readings and fan law and things like that.

Q Mr. Schluter, before you discussed with Mr. Adams in response to his questions steps to train people to take or familiarize them with the apprentice test, do you recall that discussion?

A Yes.

Q And indicating that to the best of your recollection it may have been '66 or '67 when such activity was undertaken by Local 28, is that correct?

A Yes.

Q Can you tell us the circumstances under which such, if you know, such a program or such efforts were undertaken?

A Well, it was mentioned that the Workers Defense League had a tutoring program going and the members wanted to know if they could get that same information.

Q Did, in fact, the Workers Defense League have a tutoring program?

A Yes.

Q And were you familiar with it?

A Yes.

Q And what was the basis or source of your familiarity?

A My discussions with the Workers Defense League.

Q What did that tutoring system or program consist of, if you know?

A They had a very intense program a couple nights a week in the beginning; they had volunteer tutors from large corporations and then as they evolved, they hired professional tutors.

Q Did there come a time that the tutoring system of the Workers Defense League became a subject matter of litigation between Local 28 and the New York State Human Rights Commission?

A Yes.

MS. GROSS: Objection, your Honor, on the same grounds as earlier objections, that outside litigation has no bearing on this case. We object to the answering of that question.

THE COURT: I will overrule it. You may answer.

A Yes.

Q And what was the substance of that litigation, if you recall?

A That was when NYU was giving the test and the Workers Defense League tutors had tutored the group who took the second examination and people who had received a 10% or 12% mathematics grade on the first examination had received 99's on the second examination, when they discovered that it was, in fact, the exact same examination that was given the first time.

Q Do you recall a position that the JAC took with respect to the second examination and the tutoring?

A Well, they wanted to void the examination because they felt that the people were tutored on the exact examination to be given.

Q And from '66 to the present time, to your knowledge, did the Workers Defense League continue its program of tutoring?

A Yes.

Q And do you know who has participated in that program?

A Yes.

Q And who has participated?

A The majority of the minorities who have come into our organization.

Q What does the tutoring program consist of, if you know?

A I am not exactly aware of that.

Q Do you know who is in charge of it for the Workers Defense League?

A They now have many different offices. They have an office in Chinatown. They have an office out of Queens. They have one in Nassau County. They have one up in Mount Vernon. They have one in the Bronx. They have one in Manhattan.

Q Do each of these programs provide tutoring services, to your knowledge, prior to the apprentice test given by the JAC?

A Yes.

Q Were non-minorities, whites, to your knowledge, permitted to participate in the tutoring program of the Workers Defense League?

MS. GROSS: Objection to the characterization "permitted", your Honor.

THE COURT: Overruled.

A Yes.

Q Were they permitted in 1966, to your knowledge?

A I am not really aware whether they had any non-minority people in there original tutoring. I don't

know of any in their original.

Q When Local 28 undertook the program that you described before, I think you told Mr. Adams you believe you spoke to somebody at the Workers Defense League about it, is that true?

A Yes.

Q And what did you tell them with respect to the 28 program at that time?

A I just made them aware that I was doing it. I also requested some of their material that they were using for tutoring.

Q Did they give you that material?

A Yes.

Q And after that time did you exchange material with them?

A Yes, they used some of my material.

Q And did you exchange students for people who came to the program with them?

A Yes.

Q And was this part of an exchange program that developed from '66 to the present date with the Workers Defense League?

A Yes.

Q I am not sure of the number you gave, if you gave

a number, but in the first class or first group of people that you familiarized with this, how many were in there?

A It was a small number. I don't remember.

Q If I suggest that your deposition stated ten, would that refresh your memory?

A Yes.

MR. ADAMS: Objection, your Honor. I don't think the deposition states that. Read the whole deposition -- I mean, it is not a big difference, but I think --

MR. BOGEN: I will withdraw the question at this time. I don't want to pursue it.

THE COURT: The question and answer are withdrawn.

MR. BOGEN: At this time, your Honor.

THE COURT: Yes.

MR. BOGEN: Excuse me, may I take a moment to clarify that? May I have a moment to just look at the deposition, your Honor?

THE COURT: Yes.

[Pause.]

MR. ADAMS: Page 438.

MR. BOGEN: Thanks.

I am referring, your Honor, and counsel, to the deposition of Mr. Schluter of April 27, 1973, Page 438, Lines 12 and 13.

Q Do you remember this question being propounded to you and you giving the following answer:

"Q And how large was the group?

"A Ten, twelve."

A Yes.

Q Does that refresh your memory?

A Yes.

Q I believe you told Mr. Adams before that out of the ten or twelve one was black, is that correct?

A Yes.

Q And thereafter did the size of the groups that came grow?

A Yes.

Q And did the number of minorities or blacks grow?

A Yes.

Q Did you keep a record of those persons who were referred to you by the Workers Defense League?

A No.

Q Did you keep a record of those persons who you referred to the Workers Defense League?

A No.

Q Mr. Schluter, with respect to Plaintiffs' Exhibits 75, 76 and 77, which represent minutes of the Joint Apprenticeship Committee that you were discussing with Mr.

Adams, do you recall that?

A Yes.

Q And do you recall his questions with respect to certain reports that you made in each of these meetings regarding the unemployment of the apprentices?

A Yes.

Q The report that was made at each of these meetings, what was the timing of the report with respect to the meeting?

A It reflected the unemployed apprentices at that date.

Q And with respect to the number of unemployed apprentices, how often or frequently does that change?

A Just about daily.

Q In addition to the report that you made to the Joint Apprenticeship Committee, for example, on January 3, 1974, did you keep additional, continuing records of unemployed apprentices?

A Yes.

Q Do you recall telling Mr. Adams that the report for January 3rd, '74, as appears in Exhibit 75, was to the effect that there were eleven unemployed apprentices and seven suspended apprentices? Would you consider the seven suspended apprentices unemployed?

United States Court of Appeals
For the Second Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

-against-

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Defendants-Appellants,

SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendants.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendants.

75-6079 (HFW)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL W. SCULNICK, being duly sworn, deposes and says:

1. I am not a party to this action, and am over 18 years of age.

2. On November 22, 1975, I served the annexed Reply Brief For Defendants-Appellants upon the parties appearing below at the addresses designated by said parties for that purpose, by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service at 345 Park Avenue, New York, New York 10022:

Honorable Paul J. Curran
United States Attorney for
the Southern District of New York
1 Saint Andrew's Plaza
New York, New York 10007
Attention: Taggart D. Adams, Esq.
Assistant U.S. Attorney
Attorney for Plaintiff
Equal Employment Opportunity Commission

Honorable Louis J. Lefkowitz
Attorney General, State of New York
Two World Trade Center
New York, New York 10047
Attention: Dominick Tuminaro, Esq.
Assistant Attorney General
Attorney for Third and Fourth-Party Defendant
New York State Division of Human Rights

Honorable W. Bernard Richland
Corporation Counsel, City of New York
Municipal Building
New York, New York 10007
Attention: Ellen Sawyer, Esq.
Assistant Corporation Counsel
Attorney for Plaintiff
City of New York

Rosenthal & Goldhaber
44 Court Street
Brooklyn, New York 11201
Attention: William Rothberg, Esq.
Sheet Metal and Air-Conditioning Contractors'
Association of New York City, Inc.

Sworn before me this
24th day of November, 1975.

Florence Levien

FLORENCE LEVIEN
Notary Public, State of New York
No. 31-2324751
Qualified in New York County
Commission Expires March 30, 1977

Michael W. Sculnick
Michael W. Sculnick

STATE OF NEW YORK, COUNTY OF *ss.:* ***AFFIDAVIT OF PERSONAL SERVICE***

, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of 19 at
deponent served the within
upon
by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....
Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF *ss.:* ***INDIVIDUAL VERIFICATION***

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me, this day of 19 .....
Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF *ss.:* ***CORPORATE VERIFICATION***

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....
Type or Print Name Below Signature

STATE OF NEW YORK, COUNTY OF *ss.:* ***AFFIRMATION BY ATTORNEY***

The undersigned, an attorney admitted to practice in the State of New York, affirms: That the undersigned is the attorney(s) of record for in the within action; that the undersigned has read the foregoing and knows the contents thereof; that the same are true to affirmant's own knowledge, except as to the matters therein stated to be alleged on information and belief; and as to those matters affirmant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by

The grounds of affirmant's belief as to all matters not stated to be upon affirmant's knowledge, are as follows:

The undersigned affirms that the foregoing statements are true, under the penalty of perjury.

Dated: 19 .....
Type or Print Name Below Signature

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the State of New York, does hereby certify, pursuant to Section 2105 CPLR, that I have compared the within

with the original and have found it to be a true and complete copy thereof.

Dated: 19

.....

Type or Print Name Below Signature

NOTICE OF ENTRY OR SETTLEMENT

[Check and complete appropriate box and section]

Sir(s):

PLEASE TAKE NOTICE that a

of which the within is a (true) (certified) copy

☐ *NOTICE OF ENTRY*

was duly entered in the within named court on 19

☐ *NOTICE OF SETTLEMENT*

will be presented for settlement to the Hon.

one of the judges of the within named court at the Courthouse at

on 19

at o'clock M.

Dated: 19

Yours, etc.,

SOL BOGEN

Attorney(s) for

Office and Post Office Address

ONE PENN PLAZA
NEW YORK, N. Y. 10001

To

Attorney(s) for

Index No. 75-6079 *Year 19* 75

United States Court of Appeals
For the Second Circuit

EEOC and THE CITY OF NEW YORK,

Plaintiff-Appellees,

-against-

LOCAL 28, et al.,

Defendant-Appellants.

AFFIDAVIT OF
SERVICE BY MAIL

SOL BOGEN

Attorney(s) for Defendants-Appellants

Office and Post Office Address

ONE PENN PLAZA
NEW YORK, N. Y. 10001
(212) 736-7570

To

Attorney(s) for

ADMISSION OF SERVICE

The undersigned acknowledges receipt of a copy of the within

on 19

at o'clock M.

.....

Attorney(s) for

by: .....

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF

being sworn, says: I am not a party to this action; I am over 18 years of age; I reside at

On 19 *I served the within*

upon

the attorney(s) for *in this action, at*

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

.....

Type or Print Name Below Signature

Sworn to before me

this *day of* 19 .